

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF COMMERCE

In the Matter of Home Update Co., LLC,
License No. BC20272209

**FINDINGS OF FACT,
CONCLUSIONS, AND
RECOMMENDATION**

This matter came on for hearing before Allan W. Klein, Administrative Law Judge, on April 6, 2004, in Minneapolis, Minnesota.

Appearing on behalf of the Minnesota Department of Commerce was Michael J. Tostengard, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, Minnesota 55101-2130.

Appearing on behalf of Respondent Home Update, Inc., LLC was Eric J. Rucker, Attorney at Law, Briggs and Morgan, 2200 IDS Center, 80 South 8th Street, Minneapolis, Minnesota 55402.

The hearing last less than a day, and the record closed on May 7, 2004, upon receipt of the Final Memorandum from counsel.

NOTICE

This report is a recommendation, not a final decision. The Deputy Commissioner of Commerce, Kevin Murphy, will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Kevin Murphy, Deputy Commissioner of Commerce, Minnesota Department of Commerce, 85 Seventh Place East, Suite 500, St. Paul, Minnesota 55101 to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within 10 working days to allow the Judge to determine the discipline to be imposed. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

RULING ON OBJECTION

At the close of the hearing, the parties agreed to submit letter memoranda on the subject of whether or not the Richfield Building Code required certain inspections. On April 23, the Administrative Law Judge received the Department's Memorandum, with attachments. The attachments included excerpts from Minnesota Statutes, Minnesota Rules, and the Richfield City Code. In addition, there were excerpts from the Minnesota Residential and Plumbing Code and the National Electric Code. Finally, attached was an Inspection Report issued by the City of Richfield to JDC Electric on April 7, 2004. JDC Electric was a subcontractor of Respondent. The Inspection Report alleged a number of correction items.

On May 7, 2004, the Administrative Law Judge received a Response to Department's Memorandum. The response began with an objection to some of the factual assertions in the Department's memorandum, as well as an objection to consideration of the April 7 Inspection Report. Respondent argued that this document was never produced prior to the hearing, was not introduced at the hearing, and ought not to be considered without giving Respondent an opportunity to cross-examine and respond to it.

The Administrative Law Judge rules that the excerpts from statutes, rules and codes which were attached to the Department's memorandum are properly included in the record. However, the Administrative Law Judge rules that the April 7 Inspection Report cannot be considered because Respondent has not had an opportunity to respond to it, or to cross-examine concerning it. If the Department wanted to use it, it should have produced it at the hearing. The Administrative Law Judge is not aware of what agreements were reached between counsel concerning pre-hearing discovery, and so he cannot rule on whether or not it should have been produced prior to the hearing. But that does not matter, because it should have been produced at the hearing in order for it to be considered.

STATEMENT OF ISSUES

1. Did Respondent fail to reasonably supervise its subcontractors in violation of Minn. Stat. § 326.91, Subd. 1(4) (2002)?
2. Did Respondent fail to comply with the provisions of the June 27, 2002 Consent Order in violation of Minn. Stat. § 326.9, Subd. 1(5) (2002)?

Based upon all of the files and proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACTS

1. Respondent has been in business, under a number of different names, since 1990. Respondent's current president is Rick Gurwitz, who is the son of Jerry Gurwitz. Jerry Gurwitz has been in the residential remodeling and repair industry since 1975, and currently serves as Respondent's vice president. President Rick Gurwitz has been in the industry since 1988. Respondent currently engages in residential remodeling, roofing, siding, windows, doors, bathrooms and kitchens. It is a family operated, in the sense that Jerry Gurwitz's wife does the bookkeeping, his daughter, Dana Gustafson, works in the office and his son Rick does general oversight including sales, permits, oversight of subcontractors, and collections.

2. On June 25, 2002, Respondent entered into a Consent Order with the Minnesota Department of Commerce.¹ As part of that order, Respondent's license was suspended for a period of one year, from July 1, 2002 through June 30, 2003, but the suspension was stayed on the condition that Respondent comply with provisions of the consent order. Respondent was censured and the building contractor's license was conditioned on a list of nine specific items. One of the items was that Respondent "shall reasonably supervise its employees, agents, subcontractors, or salespeople." Another of the conditions was that if Respondent fails to comply with any of the provisions of the Consent Order, the residential building contractor's license is subject to summary revocation.

3. On February 13, 2003, Rick and Jerry Gurwitz met with Jill Ressen at her home in Richfield, Minnesota. This meeting was arranged as the result of a telemarketing call made to Ressen's mother, Betty Erickson, who indicated that her daughter needed some work done on her house. Ms. Erickson also attended the February 13 meeting. Ms. Ressen showed the Gurwitzs around her home, with particular attention being paid to the basement and upstairs bathroom. She discussed what she wanted done in each of those two locations, and after discussion about the cost and other factors, Rick Gurwitz prepared a written contract.

4. The contract² is between Home Update Co., LLC and Jill Ressen. It is dated February 13, and it provides, in part, as follows:

Basement work to include: remove existing sheetrocking on all walls and ceiling in family room and closet. Install new water barrier and all new sheetrocking on walls and ceilings in both rooms. Mud and taping to be done.

Upstairs or main floor bathroom: remove existing flooring, check wood and install new luan subfloor and Congoleum no-wax flooring. Customer to select pattern. Remove existing stool and replace with new white Kohler or Moen stool and wax ring. Plumbing included for this project. Price includes all labor, materials, clean-up, haulaway, permit and lien waiver or completion.

The contract sets the total price at \$4,955.00 and indicates that Ressen supplied a cash down payment of \$2,477.00 with \$2,478.00 due upon completion. At the top of the contract it is noted that the work is to be started by March 25, 2003 and completed by April 30, 2003. There was no discussion on February 13 of any electrical work being done, and there is no mention of any electrical work in the contract.

5. Respondent arranged with Joe Weis and John Heinn to be subcontractors on the sheetrock work in the basement. They began working on March 24, and removed the existing sheetrock from the basement areas. Some of the existing sheetrock had been installed the year before by Ressen's brother, who had installed both sheetrocking and some electrical outlets. All of the sheetrock was removed, and Respondent started the project "from scratch."

6. On March 28, 2003, Ressen and Gurwitz executed a second contract. This contract relates to the installation of two bi-fold doors in the basement family room. The price of \$1,390.00 includes all labor and material. Ressen wrote Gurwitz out a check that day for the full amount.

7. As the project progressed during April, it became apparent that the basement work would not be finished by the April 30 date specified in the first contract. The bathroom plumbing and floor work was done by April 30, but the basement was not. One of Respondent's subcontractors was out for two weeks, and during the course of the project, Ressen asked for additional work to be done on the basement. She asked for the installation of some shelving, some trim work, some molding and the installation of several electrical outlets on one of the new walls. These outlets were to allow her to establish a home office in the basement. Gurwitz agreed to perform the additional work, and because the project was behind schedule, he told Ressen that he would do the additional work at no cost to her. There is no written contract covering this additional work.

8. In late April or early May, Respondent retained JDC Electrical to install the outlets which Ressen had requested for the basement. JDC Electrical agreed to charge Respondent \$400.00 for the outlet work, and did the work promptly, taking only about half a day.

9. On April 11, Ressen paid \$1,800.00 of the \$2,478.00 remaining on the original contract, leaving a balance of \$678.00. The record does not disclose why this additional payment was made.

10. The basement project proceeded intermittently, but by June 25, the new electrical outlets were installed, the walls were up, and the sheetrock had been taped. What remained to be done was painting, molding, trim and shelving. Respondent was waiting until the painting, molding and trim had been installed before requesting an inspection from the Richfield building inspector. Respondent had not requested any inspections, either electrical or building, for the basement work. The record does not disclose any indication of whether or not a plumbing inspection had been performed on the bathroom work, but plumbing is not at issue in this proceeding.

11. On June 24, 2003, Betty Erickson, the mother of Jill Ressen, called the City building inspector to inquire when an inspection could be performed. She was informed that no inspection had been requested yet, and following some discussion, a meeting was set-up between the building inspector and Ms. Erickson for the following day.

12. On June 25, Tim Kirk, the Richfield Building Inspector, met Ms. Erickson at the house. He noted that the basement walls had been framed and sheetrocked, and

that new wiring had been done in the basement. He noted that the sheetrock was all taped, and that the electrical work was all covered. A check of his records revealed that no request for inspections had been made, nor had any inspections been performed. He put in a call to Respondent, and left a message asking Respondent to call him back.

13. On June 25, Kirk also sent a letter to the Department, requesting that enforcement action be taken against Respondent because Respondent had completed extensive work in the basement without inspections being completed. Kirk indicates in the letter that Respondent had told the homeowner that Respondent would take care of permits and inspections.³

14. On the following day, June 26, Respondent returned Kirk's telephone call. Kirk told Respondent that inspections should have been requested and performed at various points along the way prior to completion of the project. Jerry and Rick Gurwitz met with Tim Kirk at the site within a week, and Kirk said there had to be an electrical inspection and a framing inspection. Kirk asked the Gurwitzs why they hadn't called for inspections before putting up the sheetrock, and they told him that they didn't think that it was necessary until the project was completed. At some point in late June or early July, the Gurwitzs met with Kirk and an electrical inspector. They took off one piece of sheetrock, and the electrical inspector said that all of the electrical work needed to be redone and inspected prior to framing. The Gurwitzs replied that some of the electrical work had been done by Ressen's brother the year before, but the inspector said it had not been properly done and all of the electrical work in the basement had to be redone.

15. On July 22, 2003, Chris Williams, an Investigator with the Department, sent a letter to Gurwitz.⁴ The letter was accompanied by a copy of Kirk's June 25 letter, and it basically asked Gurwitz to review Kirk's complaint and provide a written response by August 4.

16. Upon receipt of William's July 22 letter, Rick Gurwitz responded with a letter dated July 30.⁵ The letter was exceptionally brief, and read as follows:

Please note that since Mr. Kirk's letter was sent to you regarding Ms. Ressen's job, the following has occurred;

1. I, Rick Gurwitz, President of Home Update Co., LLC, met Mr. Kirk at the job site of Ms. Ressen to discuss her project.
2. Mr. Kirk is now aware that Ms. Ressen's job will begin tomorrow, July 31, 2003.
3. All proper permits for this job have been pulled.

We will call the City of Richfield as this job progresses for proper inspections. Please feel free to call me with any further questions.

17. When she received Gurwitz's July 30 response letter, Williams was not pleased. She thought it was a grossly inadequate response to her request for a detailed reply to the allegations made by Kirk. Her July 22 request had indicated "your response will be instrumental in the determination of whether or not a violation of Minnesota law has occurred. Therefore, it is in your best interest to be as clear and detailed as

possible in your response.”⁶ Some time prior to July 30, Gurwitz and Kirk had come to an understanding that Gurwitz would be required to remove all of the sheetrock and the electrical work, and essentially redo the job from start to finish. Gurwitz had told Kirk that this would be started on July 31. Gurwitz assumed that Kirk had brought Williams up-to-date and that Williams knew that Gurwitz had agreed to redo the whole job. That is why his letter of July 30 was so brief.

18. On or about July 31, Gurwitz did begin to redo the entire basement part of the job. He hired new subcontractors for both the electrical and sheetrocking work. Kirk came out to the house six times, inspecting the framing and insulation, and there were a number of correction items required until finally the framing and insulation was accepted in October 2003. The entire job was finally completed in December 2003.

19. After receiving Gurwitz’s terse July 30 response, Williams contacted Jill Ressen and learned that Gurwitz was redoing the work in the basement. However, Williams did not talk with either the Gurwitzs or with Kirk for further details. Instead, she reviewed the existing file of past complaints and the Consent Order. She decided that Gurwitz’s terse letter of July 30 was a misleading or incomplete response to the Department’s request for information, in violation of state law. She also concluded that failure to obtain the required inspections was a “fraudulent, deceptive or dishonest practice” in violation of state law. Unaware that the April 30 deadline in the original contract had been extended and that there was an additional contract, she concluded that the failure to complete the job prior to April 30 also constituted a breach of contract, again in violation of state law. She stated “of greatest concern” was the failure to obtain city inspections prior to completing both the framing and the electrical work in the basement. She concluded that this failure to supervise subcontractors and employees constituted a violation of the Consent Order and, therefore, she notified Home Update on August 20 that its residential building contractor license was revoked.⁷

20. Upon receipt of Williams’ Letter of Revocation, Gurwitz demanded a hearing and provided a much more detailed recitation of its side of the story.⁸ The letter points out a number of factual misunderstandings and assumptions relied upon by Ms. Williams. The letter glosses over the fact, however, that both the electrical work and the framing and insulation work had gone forward without the required inspections.

21. On October 31, 2003, the Department issued a Notice and Order for Hearing, Order for Prehearing Conference, and Statement of Charges. A prehearing conference was held on December 18, 2003, and the hearing was held on April 6, 2004.

Based on the foregoing Findings, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Deputy Commissioner of Commerce and the Administrative Law Judge have jurisdiction over this matter pursuant to Minn. Stat. §§ 14.50, 45.027 and 326.91 (2002).

2. Respondent received due, proper and timely notice of the charges against it, and of the time and place of the pre-hearing conference and hearing. The

Department has complied with all relevant substantive and procedural requirements of law and rule. This matter is, therefore, properly before the Deputy Commissioner and the Administrative Law Judge.

3. Minn. Stat. § 326.91, Subd. 1(4), provides that the Commissioner may deny, suspend, or revoke a license, or may censure a licensee, and may impose a civil penalty, if the Commissioner finds that the order is in the public interest and that the licensee has failed to reasonably supervise employees, agents, subcontractors or sales persons, or has performed negligently or in breach of contract, so as to cause injury or harm to the public.

4. Minn. Stat. § 326.91, Subd. 1(5), allows the Commissioner to take similar action against a licensee if the licensee has violated or failed to comply with any provision of an order.

5. Section 400.03 of the Richfield City Code adopts and incorporates the State Building Code. The State Building Code, in turn, sets forth the obligation for inspections. Minn. R. part 1300.0210, Subp. 1 (2003), requires rough-in inspections of electrical systems to be made before covering or concealment, and before framing inspections. Framing inspections, in turn, must be made after all framing and bracing are in place and the rough electrical has been approved. Energy efficiency inspections are also required. No work is to be performed beyond the point indicated in each successive inspection without first obtaining the approval of the building official. Home Update failed to request these inspections and failed to see to it that its subcontractors requested these inspections.

6. The Minnesota Residential and Plumbing Code, at Section R323.1, requires the use of an approved species and grade of lumber, pressure preservatively treated or decay-resistant hardwood for sills and sleepers on a concrete or masonry slab unless separated from such slab by an impervious moisture barrier. Home Update did not comply with this provision, nor did it assure that its subcontractors complied with it.

7. Minn. R. part 1315.0200, provides that all new electrical wiring must comply with the regulations contained in the National Electrical Code. The record does not contain sufficient evidence to demonstrate that respondent or its subcontractor failed to comply with any provisions of the National Electrical Code.

8. Disciplinary action against Respondent's license is in the public interest.

Based upon the foregoing conclusions, the hearing officer makes the following:

RECOMMENDATION

IT IS RESPECTIVELY RECOMMENDED that the Commissioner take disciplinary action against the Residential Building Contractor's License of Home Update, Inc.

Dated this 7th day of June, 2004.

S/ Allan W. Klein
ALLAN W. KLEIN
Administrative Law Judge

Reported: Tape Recorded.

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- ¹ Exhibit 2.
 - ² Part of Exhibit 4.
 - ³ Exhibit 1.
 - ⁴ Exhibit 3.
 - ⁵ Exhibit 4.
 - ⁶ Exhibit 3.
 - ⁷ Exhibit 5.
 - ⁸ Letter dated August 28, Exhibit 6.